



U.S. Citizenship
and Immigration
Services

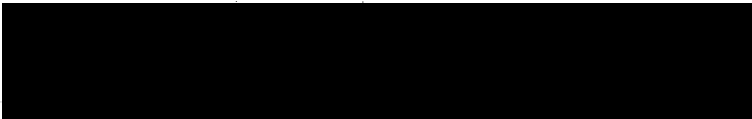
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FILE: LIN 03 232 53847 Office: NEBRASKA SERVICE CENTER

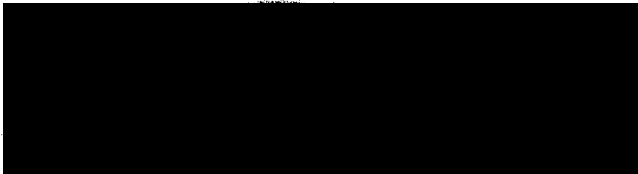
Date: OCT 25 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 214(e)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1184(e)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a medical equipment distributor that seeks to employ the beneficiary, a citizen of Canada, as a management consultant. The petitioner, therefore, endeavors to classify the beneficiary as a TN-2 alien to perform services as a professional business person pursuant to section 214(e)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(e)(2).

The director denied the petition because the proffered position does not qualify as a professional occupation according to Appendix 1603.D.1 to Annex 1603 of the North American Free Trade Agreement (the NAFTA). On appeal, counsel asserts that the proffered position qualifies as a professional occupation according to Appendix 1603.D.1 to Annex 1603 of the NAFTA.

Section 214(e)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1184(e)(2), states:

An alien who is a citizen of Canada or Mexico . . . who seeks to enter the United States under and pursuant to the provisions of Section D of Annex 1603 of the North American Free Trade Agreement (in this subsection referred to as "NAFTA") to engage in business activities at a professional level as provided for in such Annex, may be admitted for such purpose under regulations of the Attorney General promulgated after consultation with the Secretaries of State and Labor. For purposes of this Chapter, including the issuance of entry documents and the application of subsection (b), such alien shall be treated as if seeking classification, or classifiable, as a nonimmigrant under section 1101(a)(15)

Pursuant to 8 C.F.R. § 214.6(b):

Business activities at a professional level means those undertakings which require that, for successful completion, the individual has at least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

The beneficiary of this petition is a citizen of Canada. As provided in the regulation at 8 U.S.C. § 214.6(d)(3), a petition for new employment and an extension of TN-2 status on behalf of a citizen of Canada shall be accompanied by:

- (i) Proof of citizenship.
- (ii) Documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. The applicant must present documentation sufficient to satisfy the consular officer (in the case of a Mexican citizen) or the Department officer (in the case of a Canadian citizen) that the applicant is seeking entry to the United States to engage in business activities for a United States employer(s) or entity(ies) at a professional level, and that the applicant meets the criteria to perform at such a professional level. This documentation may be in the form of a letter from the prospective employer(s) in the United States or from

the foreign employer, and must be supported by diplomas, degrees or membership in a professional organization. Degrees received by the applicant from an educational institution not located within Canada, Mexico, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. The documentation shall fully affirm:

- (A) The Appendix 1603.D.1 profession of the applicant;
- (B) A description of the professional activities, including a brief summary of daily job duties, if appropriate, in which the applicant will engage in for the United States employer/entity;
- (C) The anticipated length of stay;
- (D) The educational qualifications or appropriate credentials which demonstrate that the Canadian or Mexican citizen has professional level status; and
- (E) The arrangements for remuneration for services to be rendered.

The petitioner is seeking the beneficiary's services as a management consultant. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail coordinating staff, both in-house and independent contractors, to follow management policies and procedures; consulting with clients to ascertain solutions to problems; advising the board of directors and management in financial matters and about organizational plans for operations and expansion into new medical facilities; and complying with governmental regulations. The petitioner's contract with the beneficiary indicated that the beneficiary would:

make herself available to consult with the [b]oard of [d]irectors, the officers of the [c]ompany, and the department heads of the administrative staff, at reasonable times, concerning matters pertaining to the organization of the administrative staff, fiscal policy of the [c]ompany, the relationship of the [c]ompany with its employees or with any organization representing its employees, and in general, the important problems of concern in the business affairs of the [c]ompany.

The contract also stated that the beneficiary would occasionally consult with and advise the business manager about employment, discharge, direction, control, and supervision of the administrative staff's duties and implementation of the company's goals.

Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director stated that the beneficiary's duties were more closely aligned to a market research manager or market research analyst position, positions not shown on the Appendix 1603.D.1 to Annex 1603 of the NAFTA. Consequently, the director concluded that the proffered position was not a profession listed in Appendix 1603.D.1 to Annex 1603.

On appeal, counsel asserts that the beneficiary would perform management consultant duties for the petitioner. According to counsel, the director misinterpreted the duties of the proffered position. Counsel narrates the petitioner's job description and corresponding passages of the *Occupational Information Network (O*Net)*. Counsel stresses that no marketing duties are in the petitioner's job description, and states that the *Handbook's* description of a management consultant encompasses the duties of the proffered position. Counsel emphasizes that the beneficiary previously held TN classification with another company, and contends that the beneficiary performed duties as a management consultant for U.S. employers since June 2000.

After careful consideration of the entire record, the petitioner has not shown that the proffered position satisfies the requirements for the classification sought as defined under section 214(e) of the Act.

Counsel noted that Citizenship and Immigration Services (CIS) approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision, however, does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm.1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Another of counsel's assertions is that the proffered position is that of a management consultant based on the description of a management consultant in the *O*Net*. The DOL has replaced the *Dictionary of Occupational Titles (DOT)* with the *O*Net*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The AAO routinely refers to the *Handbook* because it provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the duties of the proffered position parallel those of a management consultant.

CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position is a profession listed on Appendix 1603.D.1 to Annex 1603 of the NAFTA.

The AAO finds that the beneficiary's duties are not performed by a management consultant. According to the *Handbook*, management analysts, often referred to as management consultants in the private industry, analyze

and propose ways to improve an organization's structure, efficiency, or profits. The *Handbook* reports that analysts and consultants collect, review, and analyze information in order to make recommendations to managers. They define the nature and extent of problems; analyze relevant data, which may include annual revenues, employment, or expenditures; interview managers and employees while observing their operations; and develop solutions to problems. Once a course of action is decided, consultants report their findings and recommendations to the client, and for some projects, consultants are retained to help implement their suggestions. According to the *Handbook*, firms providing management analysis vary in size from a single practitioner to a large international organization employing thousands of consultants.

The duties of the proffered position lack specificity and are dissimilar from the duties of a management analyst. The petitioner never explains the beneficiary's duty of "consulting with clients to ascertain and determine solutions to problems." According to the I-129 petition, the petitioner has only one employee, but the job description states that the beneficiary will be "coordinating staff, both in-house and independent contractors," and will consult with "department heads." The petitioner never elaborated on the number, if any, of independent contractors that it does business with. Nor did the petitioner state that the beneficiary will analyze and propose ways to improve its structure, efficiency, or profits. The proposed duties do not entail collecting, reviewing, and analyzing information in order to make recommendations to managers. The beneficiary will not define a problem, analyze data, interview managers and employees; develop solutions to problems; report findings and recommendations to clients; or help in implementing suggestions. Consequently, the AAO cannot conclude that the duties of the proffered position are analogous to the duties of a management analyst position.

The *Handbook* describes in detail where management analysts are commonly employed; it states:

Management analysts held about 577,000 jobs in 2002. Thirty percent of these workers were self-employed, about one and a half times the average for other management, business, and financial occupations. Management analysts are found throughout the country, but employment is concentrated in large metropolitan areas. Most work in management, scientific, and technical consulting firms, in computer systems design and related services firms, and for Federal, State, and local governments. The majority of those working for the Federal Government are in the U.S. Department of Defense.

The *Handbook's* quoted passage does not suggest that the petitioning entity, a telecommunications company with one employee, would be a likely employer of a management analyst. The AAO cannot conclude that the duties of the proposed position correspond to those performed by a management analyst. As such, the petitioner cannot establish that the proffered position is an occupation on the Appendix 1603.D.1 to Annex 1603 of the NAFTA.

Accordingly, it is concluded that the petitioner has not shown that the proffered position meets the requirements for the classification sought as defined under section 214(e) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

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ORDER: The appeal is dismissed. The petition is denied.